No. 88-1847 (6)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

FORD MOTOR CREDIT COMPANY,
Appellant,
v.

DEPARTMENT OF REVENUE, STATE OF FLORIDA,
Appellee.

On Appeal from the District Court of Appeal of Florida, First District

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BRIEF FOR APPELLANT

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QUESTIONS PRESENTED

Florida imposes an unapportioned annual tax on the full value of all intangible property either (1) owned by a Florida domiciliary, regardless of the property's "business situs," or (2) having a Florida "business situs," regardless of the owner's domicile. The questions presented are:

1. Whether this Court's "internal consistency" test—designed to detect state taxes that violate the Commerce Clause by exposing interstate commerce to a discriminatory risk of multiple taxation—applies in the case of a tax on intangible property.

2. Whether a tax on intangible property fails the "internal consistency" test if, as a result of its enactment by every state, an interstate business would pay multiple taxes on the full value of its intangible property while an exclusively intrastate competitor would pay only a single tax to its state of domicile.

PARTIES AND AFFILIATED COMPANIES

All parties are named in the caption.

Appellant Ford Motor Credit Company is a wholly owned subsidiary of Ford Motor Company. Ford Motor Credit Company has no subsidiary that is not wholly owned.

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BRIEF FOR APPELLANT

OPINIONS BELOW

The opinion of the District Court of Appeal of Florida, First District (J.S. App. 1-5)[1] is reported at 537 So. 2d 1011. The order of the Supreme Court of Florida denying the petition for review (J.S. App. 21) is reported at 542 So. 2d 988. The final order of the Florida Department of Revenue (J.S. App. 6-20) is not reported.

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[1] "J.S. App." refers to the Appendix to the Jurisdictional Statement. "J.A." refers to the Joint Appendix.

JURISDICTION

The judgment of the District Court of Appeal of Florida, First District, was entered on September 13, 1988 (J.S. App. 1; J.A. 1). A timely motion for rehearing was denied on October 12, 1988 (J.S. App. 23; J.A. 1). In response to appellant's timely petition for discretionary review, the Supreme Court of Florida entered an order declining jurisdiction on February 22, 1989 (J.S. App. 21; J.A. 1). A notice of appeal to this Court (J.S. App. 24-26) was timely filed in the District Court of Appeal on April 5, 1989 (J.A. 1). The appeal was docketed on May 12, 1989, and the Court noted probable jurisdiction on June 11, 1990.

The jurisdiction of this Court rests on 28 U.S.C. § 1257(2) (1982). Section 1257 was amended by Pub. L. No. 100-352, § 3, 102 Stat. 662 (1988), which eliminated the appellate review provision of section 1257(2) and provided for review of state court judgments exclusively by writ of certiorari. Section 7 of Pub. L. No. 100-352 provided that the amendments would take effect on September 25, 1988, "except that such amendments shall not . . . affect the right to review or the manner of reviewing the judgment or decree of a court which was entered before such effective date." 102 Stat. 664. Because the judgment of the District Court of Appeal was entered on September 13, 1988—prior to the effective date of the statutory amendments—the appellate jurisdiction of this Court under former section 1257(2) was not affected by the 1988 amendments.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Commerce Clause of the United States Constitution, art. I, § 8, cl. 3, provides in relevant part:

> The Congress shall have Power . . .
>
> To regulate Commerce with foreign Nations, and among the several States . . . .

Florida Statutes Chapter 199 (1983), Intangible Personal Property Taxes, is set forth in full in the appendix to this brief. It provides in relevant part:

> **§ 199.032 Levy.**—There is hereby levied, to be assessed and collected as provided by this chapter:
>
> (1) An annual tax of 1 mill on the dollar of the just valuation of all intangible personal property . . . .
>
> **§ 199.023 Definitions.**— . . .
>
> (1) "Intangible personal property" means all personal property which is not in itself intrinsically valuable, but which derives its chief value from that which it represents, including, but not limited to, the following:
>
> . . .
>
> (d) All notes, bonds, and other obligations for the payment of money.
>
> **§ 199.052 Returns.**—
>
> (1) It is hereby made the duty of every person in the state, and every person who has become a legal resident of the state on or before January 1, who owns or has control, management, or custody of intangible personal property which is subject to annual taxation under this chapter to file a sworn return with the department on or before June 30 of each year, listing separately the character, description, location, and just valuation of all such property. This subsection applies to any person, regardless of domicile, who owns or has management, custody, or control of intangible property that has acquired a business situs in this state.
>
> **§ 199.112 Business situs.**—
>
> (1) All bills, notes or accounts receivable, obligations, or credits, wheresoever situated, arising out of, or issued in connection with, the sale, leasing, or servicing of real or personal property in the state

are subject to taxation under this chapter, it being the legislative intent to provide that such intangibles shall be assessable regardless of where they are kept, approved as to their creation, or paid. This provision shall apply to any person representing business interests in the state that may claim a domicile elsewhere, the intent further being that no nonresident, either by himself or through an agent, transact business in the state without paying the same tax which the state would impose on residents transacting the same business. Sales of tangible personal property are in this state if the property is delivered or shipped to a purchaser within this state, regardless of the f.o.b. point or other conditions of the sale. . . .

STATEMENT

Florida imposes an unapportioned annual tax on the full value of all intangible personal property that is owned by a Florida domiciliary or that has a "business situs" in the state. Intangible property is deemed to have a "business situs" in Florida if it arises out of a "sale" of property in the state, a term defined to include the delivery or shipment of property to a Florida purchaser even if the sale is consummated or title passes elsewhere.

Ford challenged the validity of the tax under the Commerce Clause, arguing that the tax violates this Court's "internal consistency" test by exposing interstate commerce to a discriminatory risk of multiple taxation from which purely local commerce is protected. The Florida District Court of Appeal sustained the tax on the ground that the "internal consistency" test does not apply to property taxation.

A. Florida's Intangible Property Tax

During the years at issue (1980-1982), Florida levied "[a]n annual tax of 1 mill on the dollar [one-tenth of one percent] of the just valuation of all intangible personal property," including certain "notes, bonds, and

other obligations for the payment of money." Fla. Stat. §§ 199.032, 199.023(1)(d) (1983).[2] The statute provided that an intangible property tax return must be filed annually by every Florida domiciliary "who owns or has control, management, or custody of intangible personal property," and by every other person, "regardless of domicile, who owns or has management, custody, or control of intangible property that has acquired a business situs in this state." § 199.052(1).[3]

As reflected on the face of the statute, and as construed by the Florida courts, the tax applies if any one of several conditions is met. First, it applies to all "intangible property owned by a domiciliary corporation, regardless of business situs." J.S. App. 3, *citing Florida Steel Corp. v. Dickinson*, 328 So. 2d 418 (Fla. 1976). Thus, for example, a note issued and approved in North Carolina in connection with the sale of property in that state to a North Carolina resident is nonetheless subject to Florida's tax if the note is owned by a Florida domiciliary. The domiciliary must pay the tax annually on the full value of the note even if it has "already been subjected to an intangible tax by another state." *Florida Steel Corp. v. Dickinson*, 308 So. 2d 623, 624 (Fla. Dist. Ct. App. 1975), *aff'd*, 328 So. 2d 418 (Fla. 1976).

Second, the tax applies to all intangible property owned by a non-domiciliary if the property has a "business situs" in Florida. The statute provides that intangibles have a business situs in Florida, "regardless of where

[2] The appendix to this brief reproduces in full the version of the Florida statute that was in effect during the years at issue. Excerpts of the most directly relevant provisions are set forth at pages 3-4, *supra*.

[3] In addition to the annual tax on intangible property, Florida imposes a separate documentary stamp tax, assessed at the rate of $.15 per $100 of value, on each instrument (such as a promissory note) "made, executed, delivered, sold, transferred, or assigned" in Florida. Fla. Stat. § 201.08 (1989).

they are kept, approved as to their creation, or paid," if they "aris[e] out of, or [are] issued in connection with, the sale, leasing, or servicing of . . . personal property in the state." § 199.112(1). A "sale" is deemed to occur in Florida not only if property is sold there in the ordinary sense of the term, but also "if the property is delivered or shipped to a purchaser within this state, regardless of the f.o.b. point or other conditions of the sale." *Id.*

Consequently, if a note is issued in connection with a sale of property in Florida (in the ordinary sense of "sale"), the statute imputes a Florida "business situs" to the note, and thereby subjects it to Florida's annual tax, even if the property was shipped to a purchaser in North Carolina. J.A. 13, 19 (state's response to interrogatory 1(a)). The result is the same even when the facts are inverted. If the sale takes place in North Carolina, the statute nevertheless imputes a Florida "business situs" to the note, and subjects it to annual taxation, if the property was shipped to a purchaser in Florida. § 199.112(1). Thus, a company that finances both Florida sales of property shipped to out-of-state purchasers and non-Florida sales of property shipped to in-state purchasers must pay Florida's annual tax on the full value of all intangibles from both categories of sales.[4]

[4] Although not apparent from the face of the statute, the state asserts that the tax applies even to an intangible owned by a nondomiciliary that arises out of a purely out-of-state transaction if the note is subsequently sent to Florida to be maintained and serviced there. J.A. 14, 19 (state's response to interrogatory 1(e)). Conversely, according to the state, if the intangible arises out of a Florida "sale," it retains its Florida "business situs" and remains subject to the annual tax even if the note is subsequently sent to another state to be maintained and serviced in that state. J.A. 13-14, 19 (state's response to interrogatory 1(c)). *See Allis-Chalmers Credit Corp. v. Department of Revenue*, 456 So. 2d 899, 903 (Fla. Dist. Ct. App.) (note arising out of a sale of equipment in Florida remains subject to the state's annual tax on intangible property even if the owner of the note "purchased and took possession of [it] outside the state and receives payments thereon outside the state"), *pet. for rev. dismissed*, 458 So. 2d 271 (Fla. 1984); *Allstate Enterprises, Inc. v. State*, 398 So. 2d 849, 850 (Fla. Dist. Ct. App. 1981) (installment note issued in connection with a sale of personal property in Florida has a Florida "business situs" even though it is sold to another party and thereafter is "physically transferred to and maintained . . . in the State of Delaware").

In no case is the tax apportioned. Florida taxes the full value of every intangible to which the tax applies even if it is subject to concurrent taxation by one or more other states. *See Florida Steel Corp. v. Dickinson*, 328 So. 2d 418, 419 (Fla. 1976); J.S. App. 3-4.

B. Ford's Business Activity

The material facts are stipulated. J.A. 2-12.

Appellant Ford Motor Credit Company ("Ford") is a wholly owned subsidiary of Ford Motor Company. It is incorporated under the laws of Delaware; its principal place of business is in Michigan; and it is qualified to do business in Florida. During the period in issue, Ford maintained seven or eight branch offices in Florida, had approximately 200 employees in the state, and had contractual relationships with 130 to 150 authorized Ford Motor Company dealers in the state. J.A. 3-4.

Ford's principal business is financing wholesale and retail sales of vehicles manufactured by Ford Motor Company. It also engages in commercial, industrial, real estate, consumer loan, and lease financing in Florida and other states. J.A. 4. Ford operates in a competitive financial services marketplace at both the wholesale and retail levels. J.A. 8. The majority of the intangibles at issue in this case are accounts receivable held by Ford and owed by Florida debtors in connection with the purchase of tangible personal property shipped to or located in Florida. J.A. 4.

The stipulation contains a detailed description of the manner in which Ford's wholesale and retail intangibles

are created and maintained. J.A. 8-12. An example of a wholesale transaction demonstrates most clearly the interstate character of Ford's financing business.

A franchised Ford Motor Company dealer typically maintains a line of credit with Ford, in most cases approved at Ford's headquarters in Michigan. The dealer places a vehicle order with Ford Motor Company's district sales office in Florida, which in turn forwards the order to an assembly plant in another state (there are no plants in Florida). Under Ford Motor Company's dealership agreements, title to the ordered vehicle passes to the dealer at the assembly plant when the vehicle is delivered to a carrier for shipment to the Florida dealer.[5] At that time, the dealer's attorney-in-fact in Michigan authorizes a draw against the dealer's line of credit, and Ford's Michigan headquarters credits the appropriate amount to Ford Motor Company's account. J.A. 8-9.

The dealer makes monthly payments on its indebtedness to Ford's branch office in Florida, which deposits the funds with a Florida financial institution. The Florida branch draws its operating funds only from an account in a Michigan bank; it may not use the wholesale deposits in the Florida financial institution for any purpose. Ford's Michigan headquarters instructs the branch office concerning the amounts to be maintained in the Florida account. In accordance with those instructions, the Florida branch arranges with an out-of-state financial institution to make daily wire transfers of funds from the Florida institution to a "pooling bank" in Pennsylvania. When the dealer sells the vehicle, it pays off the wholesale receivable through Ford's Florida branch, which notifies Ford's headquarters in Michigan to cancel the wholesale indebtedness. J.A. 9.

[5] A sample Ford Sales & Service Agreement is contained in the record as Exhibit 3 to the Pre-Hearing Stipulation. The provision governing transfer of title is ¶ 11(b), at 11-12.

While both the sale and the financing are thus consummated in other states, and the servicing of the resulting intangible is carried out in several states, Florida nonetheless imputes an in-state business situs to the intangible, and subjects it annually to the state's unapportioned intangible property tax, solely because the financed vehicle was shipped to a dealer in Florida. Fla. Stat. § 199.112(1) (1983).

Retail financing likewise implicates interstate commerce. A dealer typically enters into a retail financing contract with its customer and then offers the contract for sale in a secondary market to Ford and other institutions. Ford competes actively in the secondary market with local Florida banks. J.A. 11. If Ford acquires a contract, it transfers funds to the dealer through normal banking channels. The contract thereafter is maintained at Ford's Michigan headquarters, and the customer typically makes payment to a Florida financial institution, which handles the funds in accordance with instructions from Ford's Michigan headquarters. J.A. 11-12.

Although the intangible asset moves in interstate commerce, involves the flow of capital across state lines, and has connections with several different states, Florida nonetheless taxes its full value annually because it arose out of a sale of tangible property in that state. It makes no difference under the statute whether the debtor subsequently leaves Florida or whether the underlying property is removed from the state. *See* J.A. 13, 19. The tax continues to apply in full solely because the sale from which the intangible originated occurred in Florida.

C. Proceedings Below

Following an assessment and a formal administrative proceeding, the Florida Department of Revenue issued a final order determining that Ford owed approximately $1.2 million in underpaid intangible property taxes and approximately $500,000 in penalties, plus interest, for

the tax years 1980-1982. J.S. App. 6-20. In response to Ford's argument that the intangible property tax is invalid under the Commerce Clause of the United States Constitution, the Department's order stated that "[t]his tribunal is without jurisdiction to rule on this issue; however, all facts relevant thereto have been stipulated by the parties and, if appeal is taken, the appellate court can rule on this constitutional issue." J.S. App. 13.[6]

The District Court of Appeal affirmed the Department's order, holding that Florida's tax on intangible property "does not violate the commerce clause of the United States Constitution." J.S. App. 1. The Court acknowledged that the tax applies both to "intangible property owned by a domiciliary corporation, regardless of business situs," and to intangible property with a "business situs" in Florida, regardless of the owner's domicile. J.S. App. 3. The Court nevertheless rejected Ford's contention that "these multiple bases for taxation impermissibly burden interstate commerce" by exposing intangibles to the risk of multiple taxation. *Id.* In the Court's view, "since appellant has extended its activities regarding its intangibles to Florida and has availed itself of the benefits of the laws of several states with regard to this property, those several states, including Florida, may each impose a tax upon such intangible property." *Id.* The Court drew no distinction between apportioned and unapportioned taxation.

The District Court of Appeal rejected use of this Court's internal consistency test. While tacitly acknowledging that the state's tax on intangible property would fail the internal consistency test, the Court stated that "the test has been applied only to franchise and excise taxes," that "[t]he United States Supreme Court has long distinguished property taxation from the taxation

[6] In accordance with Florida procedure, Fla. Stat. § 72.011 (1989), Ford posted a bond for the amount in issue. This case thus involves no question concerning refunds of taxes already paid.

of interstate business activities through excise and income taxes," and that "[w]e find no suggestion in the Court's internal consistency cases that it would invade this longstanding distinction, or apply the internal consistency test in the property tax context." J.S. App. 4-5. The Court accordingly "decline[d] to extend the application of this test to Florida's intangible property tax." J.S. App. 5.

The District Court of Appeal denied rehearing. J.S. App. 23. The Supreme Court of Florida thereafter denied a petition for discretionary review. J.S. App. 21.

SUMMARY OF ARGUMENT

I.

The Commerce Clause guarantees an area of free trade among the states and protects interstate commerce from discriminatory state taxation. Although interstate commerce may be made to bear its fair share of local tax burdens, it must not be subjected to "cumulative" taxation merely because of its "interstate character." *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169, 174 (1949).

The "internal consistency" test—known by that name for less than a decade but used by the Court for the past century—is designed to identify structurally defective state tax schemes that intrinsically subject interstate commerce to risks of cumulative tax burdens from which intrastate commerce is protected. The test "focuses on the text of the challenged statute and hypothesizes a situation where other States have passed an identical statute." *Goldberg v. Sweet*, 109 S. Ct. 582, 589 (1989). If an interstate company would be required to pay multiple taxes in that situation while a comparable intrastate company would pay only a single tax, the statute fails the internal consistency test and violates the Commerce Clause.

II.

A. Florida's tax on intangible property fails the internal consistency test. It applies to every intangible that is owned by a Florida domiciliary, that arises out of a sale of property in Florida, or that arises out of a sale elsewhere if the property is delivered or shipped to Florida. If every state were to impose a tax identical to Florida's, a company that conducts its financial services business in interstate commerce would be forced to pay multiple unapportioned state taxes on the full value of the same item of intangible property—one tax to the company's state of domicile, a second to the state in which the underlying sale takes place, and a third to the state to which the underlying property is delivered or shipped. By contrast, a company that engages in the same financial services business but confines its operations solely within its state of domicile would pay only a single tax. Florida's statute therefore impedes free trade among the states by exposing interstate business to cumulative taxation solely on account of its interstate character.

There is no need to confirm the statute's facially discriminatory effect by examining the taxes actually imposed by other states. The invalidity of the Florida tax is established on the basis of its own inherent defect and does not "depend on the shifting complexities of the tax codes of 49 other States." *Armco Inc. v. Hardesty*, 467 U.S. 638, 645 (1984).

B. Florida's statute fails the internal consistency test because it attempts to tax the full value of all intangibles that are within the state's taxing jurisdiction, and makes no provision at all for apportionment, even though the same intangibles may be taxed concurrently by other states. As this Court's decisions make clear, fair apportionment is a prerequisite to constitutionally permissible state taxation of interstate commerce.

Florida can tax either (1) the full value of a portion of the intangibles with which it has nexus, or (2) a portion of the value of all the intangibles with which it has nexus. Either approach would solve the internal consistency problem. For example, if every state were to tax the full value of only those intangibles owned by its domiciliaries, interstate and intrastate companies alike would pay a single tax on all their intangible property to their state of domicile. Likewise, if every state were to tax half the value of each intangible owned by a domiciliary and half the value of each intangible with an in-state "business situs" (assuming that an intangible could have only a single "business situs"), all companies would pay a total of one full tax on the value of each intangible, and interstate commerce would suffer no multiple taxation. By contrast, Florida's statute taxes the *full* value of *all* intangibles that meet *either* condition, thereby impermissibly subjecting interstate commerce to a risk of multiple taxation that only a Florida domiciliary can avoid.

III.

A. The Florida District Court of Appeal mistakenly concluded that the internal consistency test should have no application in the case of a property tax. The Commerce Clause principles that gave rise to the internal consistency test, however, constrain state property taxation no less than other forms of state taxation. Indeed, the Court first applied what we now know as the internal consistency test in a property tax case. *Pullman's Palace-Car Co. v. Pennsylvania*, 141 U.S. 18 (1891). The Court there upheld a state tax on a railcar company's capital stock apportioned on the basis of the state's share of the total rail mileage over which the cars traveled. The Court explained that, if every state were to adopt the same tax, "the company would be assessed upon the whole value of its capital stock, and no more." *Id.* at 26.

B. There is nothing peculiar about intangible property that would justify depriving it of normal Commerce Clause protections. Intangible property rights—of which notes and other forms of indebtedness are classic examples—inhere in the legal relationships among persons, often arise out of interstate transactions, and are no less vulnerable to discriminatory state taxation than are other aspects of interstate commerce. Commercial transactions frequently require financing that depends on the availability of capital from interstate sources. The intangible property created in the course of such transactions must be protected from undue burdens for the same reason that the underlying commerce is protected. If the flow of capital were impeded by unfair exactions, the constitutional guarantee of free interstate trade would be significantly and unjustifiably compromised.

As this Court held in *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425 (1980), income from intangible property must be apportioned when several states provide benefits and protection that contribute to a company's ability to earn that income. An ad valorem tax on the intangible property itself must likewise be apportioned if, as here, several jurisdictions provide benefits and protection that contribute to the value of the intangible property.

C. This Court's Due Process decisions in *Curry v. McCanless*, 307 U.S. 357 (1939), and *State Tax Comm'n v. Aldrich*, 316 U.S. 174 (1942), do not permit multiple unapportioned taxation of intangible property that arises out of interstate commerce. Those cases held only that a nondomiciliary state may lawfully tax the transfer at death of intangible property with which it has a jurisdictional nexus. Neither case considered any issue of apportionment or discrimination. Neither addressed any question under the Commerce Clause. In fact, neither involved interstate commerce. Nothing in those decisions

supports the Florida court's erroneous impression that intangible property, alone among all objects of state taxation, deserves no constitutional protection against the risk of duplicative taxation.

ARGUMENT

I. UNDER THE INTERNAL CONSISTENCY TEST, STATE TAXES MUST BE STRUCTURED TO AVOID SUBJECTING INTERSTATE COMMERCE TO A RISK OF MULTIPLE TAXATION FROM WHICH INTRASTATE COMMERCE IS PROTECTED

In considering the constitutionality of a state tax, this Court "begin[s] with the principle that '[t]he very purpose of the Commerce Clause was to create an area of free trade among the several States.'" *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 328 (1977), *quoting McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944). "The undisputed corollary of that principle is that '"the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, but by its own force created an area of trade free from interference by the States. . . . [T]he Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States,"' including the States' power to tax." *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388, 403 (1984), *quoting Boston Stock Exchange*, 429 U.S. at 328, and *Freeman v. Hewit*, 329 U.S. 249, 252 (1946).

That does not mean that interstate commerce is entitled to "absolute immunity" from state taxation. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 281 (1977). On the contrary, "the Court consistently has indicated that 'interstate commerce may be made to pay its way.'" *Id.* But it does mean that a state may not saddle interstate trade with tax burdens from which intrastate trade is exempt. A tax violates the Commerce

Clause if—even "though nominally local"—"it imposes upon [interstate commerce], merely because interstate commerce is being done, the risk of a multiple burden to which local commerce is not exposed." *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434, 439 (1939). The guiding principle is that commerce across state lines must not be subjected to the risk of "cumulative" tax burdens on account of its "interstate character." *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169, 174 (1949).

Under the familiar four-prong test of *Complete Auto Transit, Inc. v. Brady*, a state tax withstands Commerce Clause scrutiny if it "is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." 430 U.S. at 279. The focus in this case is on the second and third prongs of the *Complete Auto* standard: the apportionment requirement and the anti-discrimination principle. Those are the restrictions to which the "internal consistency" test is addressed.

"To be internally consistent, a tax must be structured so that if every State were to impose an identical tax, no multiple taxation would result." *Goldberg v. Sweet*, 109 S. Ct. 582, 589 (1989). "Thus, the internal consistency test focuses on the text of the challenged statute and hypothesizes a situation where other States have passed an identical statute." *Id.* If, under that hypothesis, an interstate company would pay multiple taxes while a comparable intrastate company would pay only one tax, the statute fails the test.

An internally inconsistent tax impermissibly "forecloses tax-neutral decisions," *Boston Stock Exchange*, 429 U.S. at 331, because it forces interstate commerce to bear a risk of cumulative taxation from which purely local trade is shielded. The internal consistency test vindicates fundamental Commerce Clause principles by rooting out

congenitally defective taxes that on their face erect economic impediments to the conduct of interstate commerce, either because they fail to apportion fairly or because they discriminate against interstate commerce, or both.

The phrase "internal consistency" was coined in *Container Corp. v. Franchise Tax Board*, 463 U.S. 159 (1983), where the Court considered the fairness of California's formula for apportioning the net income of a multinational unitary business. The Court stated that "[t]he first, and . . . obvious, component of fairness in an apportionment formula is what might be called internal consistency—that is, the formula must be such that, if applied by every jurisdiction, it would result in no more than all of the unitary business' income being taxed." *Id.* at 169.

But the test has much deeper roots. One of its earliest manifestations was in a property tax case, *Pullman's Palace-Car Co. v. Pennsylvania*, 141 U.S. 18 (1891). In that seminal Commerce Clause decision, the Court upheld a Pennsylvania tax on the capital stock of an Illinois corporation that operated specialized rail passenger cars in interstate commerce. Pennsylvania taxed only that portion of the corporation's capital stock that corresponded to the state's share of the total rail mileage over which the passenger cars were operated. The Court held that the state's mileage-based apportionment mechanism was "just and equitable." *Id.* at 26. Using the same analysis that we now know as the "internal consistency" test, the Court reasoned that, "if [the Pennsylvania tax] were adopted by all the states through which these cars run, the company would be assessed upon the whole value of its capital stock, and no more." *Id.*

Similarly, in *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938), the Court sustained a New Mexico gross receipts tax on local sales of advertising

space in a journal published within the state but circulated in part to subscribers outside the state. In a version of internal consistency analysis, the Court reasoned that, because the tax was imposed on events that "occur in New Mexico and not elsewhere," it was "not one which in form or substance can be repeated by other states in such a manner as to lay an added burden on the interstate distribution of the magazine." *Id.* at 260.

Halliburton Oil Well Cementing Co. v. Reily, 373 U.S. 64 (1963), apparently was the first case in which the Court used an internal consistency analysis to invalidate a state tax. At issue was a Louisiana sales and use tax system that operated to impose a heavier burden on items assembled out-of-state and used in Louisiana than on similar items both assembled and used in Louisiana. The Court observed that, "[i]f similar unequal tax structures were adopted in other States, a not unlikely result of affirming here," those engaged in the "multistate activities" of assembling items in one state for use in others would be penalized in comparison with those who assembled items and used them in the same state. *Id.* at 72.[7]

An internal consistency inquiry may also be used to discern whether a particular state can fairly be held responsible for multiple taxation that results from the

[7] One year later, Justice Goldberg employed a similar analysis in his dissenting opinion in *General Motors Corp. v. Washington*, 377 U.S. 436 (1964), the rationale of which the Court subsequently adopted in *Armco Inc. v. Hardesty*, 467 U.S. 638, 642 (1984), and *Tyler Pipe Industries, Inc. v. Washington Dep't of Revenue*, 483 U.S. 232, 240-48 (1987). In explaining why he would have invalidated the Washington tax at issue, Justice Goldberg observed that "an out-of-state firm manufacturing goods in a State having the same taxation provisions as does Washington would be subjected to two taxes on interstate sales to Washington customers." 377 U.S. at 460. Such a "threat of duplicative taxation" could "discourage the development of multistate business operations" and "inhibit[] the realization of a free and open economy unencumbered by local tariffs and protective devices." *Id.*

interplay of two or more differing state taxes. In *Moorman Mfg. Co. v. Bair*, 437 U.S. 267 (1978), which upheld Iowa's single-factor sales formula for apportioning the net income of a multistate corporation, the taxpayer argued that the formula impermissibly subjected interstate businesses to duplicative taxation because it conflicted with the three-factor formula used by most other states. Using a form of internal consistency analysis, however, the Court observed that the risk of multiple taxation would be eliminated if other states were to adopt Iowa's formula. *Id.* at 277. Consequently, there was no reason to suppose that Iowa, rather than the other states, "was necessarily at fault in a constitutional sense." *Id.*

Moorman established the principle that *some* risk of multiple taxation is inevitable in our federal system. Because each state is entitled, consistent with basic Commerce Clause limitations, to structure its taxing system in a manner that best suits its needs, there may be some unavoidable "overlap" if different states adopt schemes that, while incompatible with each other, are entirely reasonable in their own right. *Id.* But where the risk of multiple taxation is inherent in a particular state's taxing scheme—that is, in *Moorman's* terms, where the risk would persist even if all other states adopted the same system—responsibility for the problem can be assigned to that state alone. In those circumstances, that state *is* "at fault in a constitutional sense." *Id.* at 277. As Professor Hellerstein has put it:

> Adventitious multiple taxation arising from the interaction of two inconsistent, but intrinsically fair, apportionment formulas may be the price we pay for federalism. Predictable multiple taxation arising from the generalized application of a single, intrinsically unfair, apportionment formula is a price we need not pay.

Hellerstein, *Is "Internal Consistency" Foolish?: Reflections on an Emerging Commerce Clause Restraint on State Taxation*, 87 Mich. L. Rev. 138, 141 (1988).

In cases decided after *Moorman*, the Court has applied the internal consistency test to invalidate several "intrinsically unfair" state taxes that jeopardized free trade by subjecting interstate commerce to the hazard of "[p]redictable multiple taxation." *Id.*

In *Armco Inc. v. Hardesty*, 467 U.S. 638 (1984), the Court struck down a West Virginia statute that taxed gross receipts from wholesaling and manufacturing but exempted from the wholesaling tax those who were subject to the state's manufacturing tax. Applying the internal consistency test, the Court determined that, if other states were to impose the same taxing scheme, companies that manufacture in one state and sell at wholesale in another state would pay both a manufacturing and a wholesaling tax, while companies that operate entirely within one state would pay only a manufacturing tax. *Id.* at 644. The discriminatory risk of multiple taxation was therefore attributable to the very structure of the West Virginia tax.[8]

The tax in *Tyler Pipe Industries, Inc. v. Washington Dep't of Revenue*, 483 U.S. 232 (1987), was the mirror image of that in *Armco*. Like West Virginia, Washington taxed the activities of manufacturing and wholesaling within the state and provided a "multiple activities" exemption for those who would otherwise have to pay both taxes. Instead of exempting local manufacturers from the wholesaling tax, however, Washington exempted local wholesalers from the manufacturing tax. The Court held that the effect was no different from that in *Armco*. Invoking the internal consistency test, the Court ruled that, if Washington's tax system were replicated in other states, those who manufacture and sell in different states would be subject, as in *Armco*, to "a multiple burden" from which those who manufacture

[8] The Court recently held that *Armco* applies retroactively. *Ashland Oil, Inc. v. Caryl*, No. 88-421 (June 28, 1990); *National Mines Corp. v. Caryl*, No. 89-337 (June 28, 1990).

and sell in a single state would be exempt. 483 U.S. at 248.

In *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266 (1987), decided the same day as *Tyler Pipe*, the Court again applied the internal consistency test to invalidate Pennsylvania's lump-sum annual taxes on the operation of trucks on the state's highways. "If each State imposed flat taxes for the privilege of making commercial entrances into its territory, there is no conceivable doubt that commerce among the States would be deterred." *Id.* at 284. That is so because those who operate their trucks in several states would be required to pay multiple flat taxes, while those who limit their operations to a single state would pay only one tax.

There was no such discrimination on the face of the statute in *Goldberg v. Sweet*, 109 S. Ct. 582 (1989). The Court there upheld an Illinois tax on interstate telephone calls that originated or terminated in Illinois and that were charged to an Illinois service address. The Court concluded that the tax was "internally consistent, for if every State taxed only those interstate phone calls which are charged to an in-state service address, only one State would tax each interstate telephone call." *Id.* at 589.

In sum, the internal consistency test, first used nearly a century ago, is now an established component of the Court's Commerce Clause jurisprudence, integral to the "consistent and rational method of inquiry" that the Court has applied in the wake of *Complete Auto*. *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 443 (1980). It has stood the test of time because it is a simple, practicable tool that can be applied easily by state courts and legislatures to expose intrinsic flaws in state taxes. The test does not solve every potential Commerce Clause problem, but it clearly and logically marks the outer boundaries of constitutional state taxation and serves as an important screening device to identify

facially defective taxing schemes that inevitably endanger free trade among the states.

II. FLORIDA'S UNAPPORTIONED TAX FAILS THE INTERNAL CONSISTENCY TEST BECAUSE IT EXPOSES INTANGIBLE PROPERTY ARISING OUT OF INTERSTATE COMMERCE TO A DISCRIMINATORY RISK OF MULTIPLE TAXATION

A. If Every State Imposed the Same Tax, There Would Be Impermissible Interference with Free Trade

Florida's tax fails the internal consistency test. The tax is imposed annually, without any apportionment, on the full value of all intangible property that is owned by a Florida domiciliary, regardless of the property's "business situs," or that has a Florida "business situs," regardless of the owner's domicile. "Business situs" is defined by the statute to encompass any intangible that arises out of a sale of property in Florida or a sale in another state of property delivered or shipped to a purchaser in Florida. Fla. Stat. §§ 199.032, 199.052(1), 199.112(1) (1983).

The tax applies, therefore, in any one of the following circumstances: (1) the owner of the intangible has a Florida domicile; (2) the intangible arises out of a sale of property in Florida; or (3) the intangible arises out of a sale elsewhere but the property is delivered or shipped to a Florida purchaser. If every state were to adopt an identical tax—"a not unlikely result of affirming here" (*Halliburton*, 372 U.S. at 72)—a company that conducts its financial services business in interstate commerce would pay as many as three different taxes on the full unitary value of each of its intangibles: one to its state of domicile, one to the state in which the sale of the financed property was consummated, and one to the state to which the financed property was delivered or shipped. A company that conducts the same financial services business but confines its operations exclusively

to its state of domicile would pay only a single tax on each intangible. Under the internal consistency test, the Florida tax is facially invalid.

Professor Hellerstein has pointed to Florida's intangible property tax as an "example of an existing taxing scheme that appears to violate the 'internal consistency' principle." Hellerstein, 87 Mich. L. Rev. at 162. He stated:

> If every state adopted an intangible property tax that applied both to property owned by its domiciliaries and to property with a business situs in the state, the enterprise domiciled in one state but employing intangible property in another, where it acquires a business situs, would pay two taxes on its intangibles whereas its wholly intrastate competitor would pay but one tax. Assuming that the Court would have little difficulty in concluding that such interference with interstate capital flows affected commerce so as to warrant commerce clause scrutiny, the "impermissible interference with free trade" under the "internal consistency" doctrine would be self-evident.

Id. at 162-63 (footnotes omitted).

As a Delaware corporation with its principal place of business in Michigan, Ford is potentially exposed to a domiciliary tax elsewhere on the full value of the same intangibles that Florida taxes on account of their "business situs" in Florida.[9] Ford bears that risk of multiple taxation solely because of the interstate nature of its

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[9] That possibility is hardly remote. For example, Michigan imposes an unapportioned tax on intangible property owned by a Michigan domicilary. Mich. Comp. Laws §§ 205.131(c), 205.132(a) (1986). The statute currently exempts intangible property owned by a corporation that, like Ford, is engaged in business activity in the state and is subject to taxation under the Michigan Single Business Tax. *Id.* § 205.133(b)(12). But the Michigan legislature could eliminate that exemption as easily as it enacted the provision in the first place.

financial services business. By contrast, financial institutions domiciled in Florida—with whom Ford actively competes for much of the financing business that gives rise to its intangible property (J.A. 11)—bear no comparable risk of such multiple taxation if they limit their financing operations to exclusively in-state transactions.

There is no need to show that other states actually impose an intangible property tax like Florida's or that Ford suffered actual multiple taxation of its intangibles during the years in issue. When a tax fails the internal consistency test, the conclusion that it "facially discriminates against interstate commerce need not be confirmed by an examination of the tax burdens imposed by other States." *Tyler Pipe*, 483 U.S. at 247. "Any other rule would mean that the constitutionality of [one state's] tax laws would depend on the shifting complexities of the tax codes of 49 other States, and that the validity of the taxes imposed on each taxpayer would depend on the particular other States in which it operated." *Armco*, 467 U.S. at 644-45.[10]

B. The Cause of the Problem Is the State's Failure to Apportion the Tax

The flaw in Florida's tax is not hard to find. The tax is assessed on alternative bases—domicile in the state, sale of property in the state, or delivery or shipment of property to the state. The statute thus recognizes at least three distinct grounds on which the state may assert taxing jurisdiction over an intangible. What is good enough for Florida, however, is good enough for other states as well. In any particular case, therefore,

[10] *See also Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 444 (1980) ("the constitutionality of a Vermont tax should not depend on the vagaries of New York tax policy"); *Freeman v. Hewit*, 329 U.S. 249, 256 (1946) ("The immunities implicit in the Commerce Clause and the potential taxing power of a State can hardly be made to depend . . . on the shifting incidence of the varying tax laws of the various States at a particular moment.").

as many as two other states might assert jurisdiction to tax the same intangible under the same jurisdictional theory. Yet the statute has no apportionment mechanism. It annually taxes 100 percent of the outstanding value of every intangible to which it applies.

That presents a classic Commerce Clause problem. As the Court has stated, "[b]y its very nature an unapportioned gross receipts tax makes interstate transportation bear more than 'a fair share of the cost of the local government whose protection it enjoys.'" *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653, 663 (1948), *quoting Freeman v. Hewit*, 329 U.S. 249, 256 (1946). Likewise, an unfairly apportioned tax on the income of a multistate company "is a form of discrimination against interstate commerce." *Armco*, 467 U.S. at 644.

The same can be said of an unapportioned tax on intangible property that has connections with more than one state. Because each intangible has only a single, unitary value, a state tax on intangibles must be fairly apportioned to avoid discrimination against interstate commerce and interference with free trade.

Florida can choose from among several apportionment mechanisms. First, it can tax the *full* value of a *portion* of the intangibles at issue. The state might elect, for example, to tax the entire value of all intangibles owned by its domiciliaries. Assuming that domicile were defined to ensure that a corporation could have only one domicile at a time, that limitation would effectively apportion the tax, at least for internal consistency purposes: if all states were to adopt the same taxing mechanism, an interstate business would pay only a single unapportioned tax on all of its intangibles to its state of domicile. Or Florida could choose to tax the entire value of all intangibles that arise out of a sale of property in the state. That, too, would solve the internal consistency problem: if every state taxed on the basis of the location of the sale, all companies, interstate and intrastate alike, would

pay a single unapportioned tax to the one state in which the sale took place.

That is essentially the way Illinois handled the telecommunications tax at issue in *Goldberg v. Sweet.* It taxed the entire gross charge of interstate telephone calls that originated or terminated in Illinois *and that were charged to an Illinois service address.* By limiting the tax to those calls that were charged to an Illinois address, the state effectively apportioned the entire tax base in a reasonable fashion. As Justice Stevens observed in his concurring opinion, "[b]y taxing half of the relevant universe of interstate calls at full value, Illinois achieves the same economic result as taxing all of those calls at half value would achieve." 109 S. Ct. at 593.

Second, Florida can tax a *portion* of the value of *all* the intangibles at issue. For example, if Florida wishes to tax intangible property that either is owned by a Florida domiciliary or has a Florida business situs, a simple but fair method of apportionment might be to tax the entire value of an intangible that is both owned by a domiciliary *and* has an in-state business situs, and to tax half the value of an intangible that satisfies only one or the other of those standards. Assuming that "business situs" were defined to ensure that the same intangible could not have a business situs in more than one state at the same time, an apportionment formula of that sort would solve the internal consistency problem that infects Florida's current statute. If every state adopted the same tax, an interstate business would pay a tax on half the value of its intangibles to its domiciliary state and a tax on the remaining half to the states in which the intangibles have a business situs. An intrastate company would pay a tax on the full value of its intangibles to its domiciliary state. Interstate commerce would bear no discriminatory tax burden.

Thus, Florida may tax *all* of the value of a *portion* of the intangibles; or it may tax a *portion* of the value of

all the intangibles. What it cannot do is tax *all* of the value of *all* the intangibles. Yet that is precisely what Florida seeks to do. It predicates its tax on alternative jurisdictional bases, thereby sweeping into the tax base the full value of intangible property that other states can assert jurisdiction to tax on the same bases. But Florida makes no provision for apportioning the resulting interstate values.

The situation here is therefore like that in *Goldberg v. Sweet* except without the limiting feature of the Illinois statute that narrowed the tax to calls charged to an Illinois address. Had the state there attempted to tax the full value of all calls that originated or terminated in Illinois regardless of where they were charged, and if, like Florida, the state had made no other provision for apportioning the resulting tax base, there is no doubt that the tax would have failed the internal consistency test and would have violated the apportionment prong of *Complete Auto.*

Apportionment would not necessarily extinguish all risk of double taxation. For example, Florida might choose to tax intangibles on the basis of domicile, while Georgia might tax intangibles on the basis of business situs. In that case, a Florida domiciliary conducting a financial services business in Georgia would pay a tax in each state on the full value of its intangibles, while a domiciliary of either state conducting a purely intrastate financial services business would pay only a single tax to its home state. (Justice Scalia made a similar observation in his dissenting opinion in *Tyler Pipe*, 483 U.S. at 258-59. *See also* Hellerstein, 87 Mich. L. Rev. at 178-79.) But that is a permissible result, from the standpoint of internal consistency, for three reasons.

First, the multiple taxation in that situation is what Professor Hellerstein calls "adventitious"—that is, "arising from the interaction of two inconsistent, but intrinsically fair" taxing schemes, rather than from "the

generalized application of a single, intrinsically unfair" scheme. *Id.* at 141. Because neither state is "necessarily at fault in a constitutional sense," *Moorman*, 437 U.S. at 277, the exposure to multiple taxation in those circumstances may simply be part of "the price we pay for federalism." Hellerstein, 87 Mich. L. Rev. at 141.

Second, interstate commerce as a whole may suffer little or no net disadvantage in the hypothesized circumstances. While a Florida domiciliary operating in Georgia would pay an unapportioned tax to both states, a Georgia domiciliary operating in Florida would pay no tax to either state. Even if the accounts do not balance out precisely, the number of interstate companies that suffer may be roughly equal to the number that benefit. *See id.* at 179-80 n.221.

Third, as the Court stated in *Goldberg v. Sweet*, "to the extent that other States have passed [different] statutes which create a risk of multiple taxation, we reach that issue under the external consistency test." 109 S. Ct. at 589. That separate inquiry asks "whether the state has taxed only that portion of the . . . interstate [value] . . . which reasonably reflects the in-state component of the activity being taxed." *Id.* The external consistency test thus ensures that any multiple taxation resulting from the interaction of internally consistent taxes adopted by different states is kept within constitutionally tolerable bounds.

What is constitutionally intolerable under the Court's decisions is the risk of multiple taxation caused by an internally inconsistent scheme like Florida's.

III. THERE IS NO EXCEPTION TO THE INTERNAL CONSISTENCY TEST FOR PROPERTY TAXES IN GENERAL OR INTANGIBLE PROPERTY TAXES IN PARTICULAR

A. Property Taxes, No Less Than Income and Excise Taxes, Can Interfere with the Free Flow of Interstate Commerce and Are Subject to Scrutiny Under the Same Commerce Clause Standards

The Florida District Court of Appeal refused to apply the internal consistency test in this case. It believed that this Court "has long distinguished property taxation from the taxation of interstate business activities through excise and income taxes." J.S. App. 4. The Court could "find no suggestion in the [Supreme] Court's internal consistency cases that it would invade this longstanding distinction, or apply the internal consistency test in the property tax context." J.S. App. 5.

Contrary to the District Court of Appeal's theory, there is no basis in the Commerce Clause or in this Court's precedents for a property tax exception to the internal consistency test. At least since the decision in *Complete Auto*, it has been clear that the validity of a state tax under the Commerce Clause depends, not on its form, but on its "practical effect" in light of "economic realities." 430 U.S. at 279. Any tax that "substantially affects interstate commerce," even if it "attaches only to a 'local' or intrastate activity," is subject to scrutiny under the *Complete Auto* standard. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 614, 615 (1981) (coal severance tax). An exaction that "produces a forbidden effect" on interstate commerce (*Complete Auto*, 430 U.S. at 288) is therefore no less invalid merely because it takes the form of a property tax.

It is indisputable, of course, that property taxation as a general matter is subject to Commerce Clause constraints. Numerous cases, many of which form the backbone of this Court's Commerce Clause jurisprudence,

have involved state property taxes. *E.g., Norfolk & Western Ry. v. Missouri State Tax Comm'n*, 390 U.S. 317 (1968) (railroad rolling stock); *Central R.R. v. Pennsylvania*, 370 U.S. 607 (1962) (railroad freight cars); *Braniff Airways, Inc. v. Nebraska Board of Equalization*, 347 U.S. 590 (1954) (flight equipment of air carrier); *Standard Oil Co. v. Peck*, 342 U.S. 382 (1952) (vessels); *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169 (1949) (vessels); *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292 (1944) (airplanes); *American Refrigerator Transit Co. v. Hall*, 174 U.S. 70 (1899) (refrigerated railroad cars).

Those cases establish that a property tax, like any other state tax, must be apportioned where the property is subject to taxation by more than one jurisdiction. "The problem under the Commerce Clause is to determine 'what portion of an interstate organism may appropriately be attributed to each of the various states in which it functions.'" *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. at 174, *quoting Nashville, C. & St. L. Ry. v. Browning*, 310 U.S. 362, 365 (1940).

Property that has a fixed situs can be taxed without apportionment by the state in which it is located, because that state and no other provides "the benefit and protection of laws enabling the owner to enjoy the fruits of his ownership." *Curry v. McCanless*, 307 U.S. 357, 364 (1939). As with a tax on a purely local event—such as the severance of minerals, *Commonwealth Edison Co. v. Montana*, 453 U.S. at 617, or the activity of wholesaling, *Tyler Pipe*, 483 U.S. at 251—apportionment is not required where "no other state has jurisdiction to tax." *Id.*

But apportionment *is* required when other states *do* provide benefits sufficient to give them concurrent taxing jurisdiction. In the absence of apportionment, "there would be multiple taxation of interstate operations and the tax would have no relation to the opportunities, benefits, or protection which the taxing state gives those operations." *Standard Oil Co. v. Peck*, 342 U.S. at 385.

Not even a domiciliary state is immune from the rule of apportionment. The Court has held, for example, that "tangible property for which *no* tax situs has been established elsewhere may be taxed to its full value by the owner's domicile." *Central R.R. v. Pennsylvania*, 370 U.S. at 612 (emphasis in original). At the same time, however, "the domiciliary State is precluded from imposing an ad valorem tax on any property to the extent that it *could* be taxed by another State, not merely on such property as *is* subjected to tax elsewhere." *Id.* at 614 (emphasis in original).

There is every reason to suppose that the internal consistency test, developed in part to expose facially malapportioned or unapportioned state taxes, applies in the case of property taxation. The particular taxes at issue in the Court's recent internal consistency cases have happened to be income or excise taxes. But those categories of taxes have no monopoly on endangering free trade. Nothing in the nature of such taxes, nothing about the internal consistency test itself, and nothing in the Court's application of that test suggests any principled basis for immunizing property taxation from similar scrutiny. If a state tax implicates interstate commerce, and if it cannot survive scrutiny under the internal consistency test, it should be invalidated no matter what form it takes or what label it may have.

One of the cases on which the Florida court relied in suggesting that property taxes deserve special dispensation from normal Commerce Clause constraints was *Pullman's Palace-Car Co. v. Pennsylvania*, 141 U.S. 18 (1891). Ironically, that was a property tax case in which the Court applied the internal consistency test, though without calling it by that name. The Court in *Pullman's Palace-Car* upheld an apportioned tax on a

railcar company's capital stock because, 'if [the tax] were adopted by all the states through which these cars ran, the company would be assessed upon the whole value of its capital stock, and no more." *Id.* at 26. There is no question that the Court viewed the tax as a property tax. It stated that "[t]he tax on the capital of the corporation on account of its property within the state is, in substance and effect, a tax on that property." *Id.* at 25.

From its very inception, therefore, the inquiry that we have come to call the internal consistency test was applied to a form of property taxation. Property taxes should not now be insulated from the same inquiry merely because the Court has given the test a new name.

B. Nothing About Intangible Property Justifies Depriving It of Ordinary Commerce Clause Protections

The District Court of Appeal, while acknowledging that the state's tax on intangible property "may affect appellant's interstate activities," apparently believed that ordinary Commerce Clause protections do not apply here because the tax "is not integrally related to interstate commerce" and has only an "'incidental and indirect effect'" on such commerce. J.S. App. 4. But the distinction between "direct" and "indirect" burdens on interstate commerce has had no constitutional significance at least since *Complete Auto*, which made clear that such formalisms no longer control Commerce Clause analysis. The validity of a state tax today depends not on whether it is "integrally" or "peripherally" related to interstate commerce, and not on whether it burdens that commerce "directly" or "indirectly," but on whether it has the impermissible effect of interfering with free trade among the states. The internal consistency test is one important measure by which to detect such interference, and there is nothing about intangible property that warrants a departure from that standard.

The Florida statute defines "intangible personal property" to mean "all personal property which is not in itself intrinsically valuable, but which derives its chief value from that which it represents." Fla. Stat. § 199.023(1). As this Court has stated, intangibles are "rights which are not related to physical things"; they "are but relationships between persons, natural or corporate, which the law recognizes by attaching to them certain sanctions enforceable in courts." *Curry v. McCanless*, 307 U.S. 357, 365-66 (1939). Consequently, "[t]he power of government over [intangibles] and the protection which it gives them" can be exerted "only through control over and protection afforded to those persons whose relationships are the origin of the rights." *Id.* at 366.[11]

Intangible property rights can arise out of interstate commerce and often have an inherently interstate character. When a company like Ford finances the sale of a vehicle to a Florida automobile dealer at an assembly plant in Georgia, the "persons whose relationships are the origin of the [intangible property] rights" (*Curry v. McCanless*, 307 U.S. at 366) have connections with several different states, and the flow of capital that gives rise to the intangible plainly crosses state boundaries. It would make little sense to exclude such property from the protective umbrella of the Commerce Clause. If states were free to impose discriminatory tax burdens on intangibles connected with interstate transactions, the result would be not only to restrict the movement of

[11] While tangible property is thought of as a "physical thing" and intangible property as a legal relationship between persons (*Curry*, 307 U.S. at 366), some have questioned the distinction. "[T]angible property is worthless when divorced from the set of legally enforceable relationships between persons which give the object value—for example, the landowner's legal right of exclusive possession. . . . To this extent even tangible property is 'intangible.'" *Developments in the Law—Federal Limitations on State Taxation of Interstate Business*, 75 Harv. L. Rev. 953, 990 n.203 (1962).

capital in interstate markets but also to impede the underlying commerce that depends on the availability of such capital.

It is no surprise, therefore, that this Court has assumed that the Commerce Clause applies in full measure to intangibles. In *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318 (1977), which struck down as discriminatory New York's transfer tax on securities transactions, the Court extended the protections of the Commerce Clause to "[t]he flow of interstate commerce in securities," a paradigmatic form of intangible property.

Other courts that have addressed the issue directly have concluded without difficulty that "the passage of investment capital across state lines . . . [lies] within the constitutional policy of free trade and competition." *Wilson v. Department of Revenue*, 302 Or. 128, 135, 727 P.2d 614, 618 (1986) (en banc). In that case, which involved the acquisition and disposition of interests in real property outside the taxing jurisdiction, the Supreme Court of Oregon correctly reasoned that, "[b]ecause capital investment is basic to a system of free trade, and because the framers intended to create an area of free trade under the Commerce Clause, a state law keeping investment capital . . . within the state can have a restrictive impact on the capital markets and implicate the Commerce Clause." *Id.* at 135, 727 P.2d at 619.[12]

The same Commerce Clause limitations that protect numerous objects of state taxation—net income, gross

[12] *See also Dominion Nat'l Bank v. Olsen*, 771 F.2d 108, 110-11 (6th Cir. 1985) (Commerce Clause applies to tax on earnings from certificates of deposit issued by out-of-state financial institutions and owned by residents of the taxing state); *Aronson v. Commonwealth*, 401 Mass. 244, 248, 516 N.E.2d 137, 140 (1987) (Commerce Clause applies to tax on interest earned by taxing state's residents on deposits in out-of-state financial institutions), *cert. denied*, 109 S. Ct. 58 (1988).

receipts, tangible property, and the like—should protect intangible property as well. Intangibles are no less exposed to the risk of duplicative state taxation that would obstruct free interstate trade. Because intangibles inhere in legal relationships among persons, a number of states might justly claim that they provide some measure of benefit and protection to any particular intangible and that they are therefore entitled to tax its value. As in the case of tangible property, such as railroad cars or vessels or airplanes, the rule of apportionment should apply to a tax on intangible property whenever more than one state provides benefits and protection sufficient to assert taxing jurisdiction over that property.

This Court has already held that *income* from intangible property is subject to apportionment, and the rationale of its decision strongly implies that an ad valorem tax on the intangible property itself must likewise be apportioned. The issue in *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425 (1980), was whether Vermont could tax an apportioned share of Mobil's dividend income from foreign subsidiaries. The company argued that New York, its state of domicile, had the power to tax the dividend income without apportionment and that Vermont's taxation of an apportioned share of the same income subjected the company to duplicative taxation.

The Court disagreed with Mobil's premise. Though the Court assumed that the state of domicile "has the authority to lay some tax on [Mobil's] dividend income as well as on the value of its stock," it could see "no reason in theory why that power should be exclusive when the dividends reflect income from a unitary business, part of which is conducted in other States." *Id.* at 445-46. Where "the income bears relation to benefits and privileges conferred by several States," "apportionment is ordinarily the accepted method" of taxation. *Id.* at 446.

Under the same principle, state taxes on intangible property should be apportioned "when the taxpayer's activities with respect to the intangible property involve relations with more than one jurisdiction." *Id.* at 445. In those circumstances, where the intangible property "enjoys privileges and protections conferred by" several states (*id.*), apportionment is required to avoid a constitutionally impermissible risk of multiple taxation, the very risk that the internal consistency test was designed to protect against. Thus, while the Court in *Mobil* left open the question whether the state of domicile might validly impose an unapportioned tax on intangible property (*id.* at 446), the rationale of its decision leaves little doubt that a *non*-domiciliary state has no constitutional basis for doing so.

C. This Court's Due Process Decisions Do Not Override Applicable Commerce Clause Restrictions Against Multiple Taxation

The Florida court was untroubled by the possibility that Ford and other interstate companies might be forced to bear cumulative tax burdens on account of the same intangibles. It believed that, "since [Ford] has extended its activities regarding its intangibles to Florida and has availed itself of the benefits of the laws of several states with regard to this property, those several states, including Florida, may each impose a tax upon such intangibles." J.S. App. 3.

That a taxpayer conducts business operations within a state and thereby avails itself of benefits provided by that state does not insulate the state's taxation from scrutiny under the internal consistency test. In *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266 (1987), for example, the interstate truckers subject to Pennsylvania's flat taxes plainly "extended [their] activities" to Pennsylvania and "availed [themselves] of the laws of several states." J.S. App. 3. But the taxes were nonetheless condemned

because they imposed on such interstate truckers an impermissible risk of multiple taxation from which intrastate truckers were exempt.

Ford's multistate activities giving rise to its intangible property unquestionably would justify the imposition of *apportioned* taxation by each of the several states that have taxable connections with that property. The District Court of Appeal mistakenly concluded, however, that Florida, and presumably each of the other states, could freely impose *unapportioned* taxation on the same intangibles.

That conclusion rests on a misreading of *Curry v. McCanless*, 307 U.S. 357 (1939), and *State Tax Comm'n v. Aldrich*, 316 U.S. 174 (1942). The issue in both cases was whether a non-domiciliary state had sufficient jurisdictional nexus, under the Due Process Clause, to impose a death tax on the transfer of an interest in intangible property with which the state had some connection. In *Curry*, a Tennessee domiciliary transferred at death the beneficial interest in certain stocks and bonds held by a corporate trustee domiciled in Alabama. In *Aldrich*, a New York domiciliary transferred at death shares of stock in a corporation organized under the laws of Utah. In both cases, the Court held that the domiciliary state did not have exclusive taxing jurisdiction and that a state with connection to the property itself could also tax the transfer.

The Court in *Curry* rested its decision on "the impossibility in the circumstances of this case of attributing a single location to that which has no physical characteristics and which is associated in numerous intimate ways with both states." 307 U.S. at 362-63. Likewise, the Court in *Aldrich* ruled that "'jurisdiction to tax' is not restricted to the domiciliary State" and that "[a]nother State which has extended benefits or protection . . . may likewise constitutionally make its exaction." 316 U.S. at 181-82.

In each case, the Court focused only on the question of taxing jurisdiction under the Due Process Clause. Neither case raised any issue of apportionment. Neither presented any question under the Commerce Clause.

Although the Court in *Curry* said that "more than one state may have jurisdiction to impose a tax and measure it by some or all of the taxpayer's intangibles" (307 U.S. at 368)—a point echoed by the Court's comment in *Aldrich* that "there is no constitutional rule of immunity from taxation of intangibles by more than one State" (316 U.S. at 181)—those statements merely underscore the fundamental precept of taxing nexus. Where an object of taxation has connections with several jurisdictions, each providing the taxpayer with benefits and protections for which it "may constitutionally ask a return" (*id.* at 180), each has legitimate taxing jurisdiction under Due Process principles. Certainly there is no reason to infer from those statements that each state may impose a wholly unapportioned tax under an internally inconsistent taxing scheme.

Because the only issue in *Curry* and *Aldrich* was *whether* a non-domiciliary state could tax the transfer of intangible property, not the *extent* to which the state could tax that event, neither case can fairly be read to imply that a non-domiciliary state like Florida may validly impose an unapportioned tax on intangible property that arises out of interstate commerce and therefore has taxable connections with several states. Those are the circumstances in which Commerce Clause protections come into play and in which the internal consistency test serves the important function of protecting interstate commerce from the discriminatory burdens of unapportioned taxation.

CONCLUSION

The judgment of the District Court of Appeal should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX

FLORIDA STATUTES
(1983)

CHAPTER 199

INTANGIBLE PERSONAL PROPERTY TAXES

PART I GENERAL PROVISIONS
(§§ 199.012-199.072)

PART II ASSESSMENT PROCEDURES
(§§ 199.103-199.122)

PART III ADMINISTRATIVE, COLLECTION, AND ENFORCEMENT PROCEDURES
(§§ 199.202-199.292)

PART I

GENERAL PROVISIONS

199.012 Short title.

199.023 Definitions.

199.032 Levy.

199.042 Date of delinquency; discounts for early payment.

199.052 Returns.

199.062 Information reports; companies, corporations, and brokers.

199.072 Exemptions.

199.012 Short title.—This chapter shall be known and may be cited as the "Intangible Personal Property Tax Act."

199.023 Definitions.—The following terms and phrases when used in this chapter shall have the meaning ascribed to them in this section, except where the context clearly indicates a different meaning:

(1) "Intangible personal property" means all personal property which is not in itself intrinsically valuable, but which derives its chief value from that which it represents, including but not limited to, the following:

(a) Money, including, without limitation, United States legal tender, certificates of deposit, cashier's and certified checks, bills of exchange, drafts, the cash equivalent of annuities and life insurance policies, and similar instruments:

1. Held by a taxpayer;

2. Deposited in or with banks or other corporations, institutions, or persons doing a similar type of business;

3. Placed with, deposited with, or entrusted as a shareholder to building and loan associations, savings associations, credit unions, or similar institutions; or

4. Deposited with or held by any person.

(b) All stocks or shares of incorporated or unincorporated companies, business trusts, and mutual funds.

(c) All beneficial interests of residents in trusts.

(d) All notes, bonds, and other obligations for the payment of money.

(e) All condominium and cooperative apartment leases of recreation facilities, land leases, and leases of other commonly used facilities. These leases shall not be valued as other than intangibles.

(f) Excepting any such leasehold estate or possessory interest subject to classification pursuant to § 4(a), Art. VII of the State Constitution, all leasehold estates, or any possessory interests created thereby, in property of the United States, of the state or any of its political subdivisions, or of municipalities, agencies, authorities, and other public bodies corporate of the state, which leasehold estates or possessory interests are undevelopd or predominantly used for residential or commercial purposes and upon which rental payments are due in consideration of such leasehold estates or possessory interests; except that leasehold estates or possessory interests described by § 196.199(7) shall not be included herein.

(2) "Person" means any individual, firm, partnership, joint adventure, syndicate, or other group or combination acting as a unit, association, corporation, estate, trust, business trust, trustee, executor, administrator, receiver, or other fiduciary and includes the plural as well as the singular.

(3) "Taxpayer" means any person liable for taxes imposed under this chapter, any agent required to file and pay any taxes imposed hereunder, the lessee of governmentally owned property as defined in paragraph (1)(f), and the heirs, successors, assignees and transferees of any such person or agent.

(4) "Department" means the Department of Revenue.

(5) "In the state" means within the exterior limits of Florida.

(6) "Beneficial interest" means the ownership of one or more property rights in the principal or income of a trust, whether vested, contingent, or subject to conditions, but it does not mean an interest in trust income only.

(7) "Affiliated group" means one or more chains of includable corporations connected through stock ownership with a common parent corporation which is an includable corporation, providing that:

(a) Stock possessing at least 80 percent of the voting power of all classes of stock and at least 80 percent of each class of the nonvoting stock of each of the includable corporations, excepting therefrom the common parent corporation, is owned directly by one or more of the other includable corporations; and

(b) The common parent corporation owns directly stock possessing at least 80 percent of the voting power of all classes of stock and at least 80 percent of each class of the nonvoting stock of at least one of the other includable corporations.

As used in this subsection, the term "nonvoting stock" does not include nonvoting stock which is limited and preferred as to dividends.

(8) "Genuine primary security" means the collateral to which the taxpayer, either by law, regulation, or contract, looks first for collection.

(9) "Banking organization" means:

(a) A bank organized and existing under the laws of this state;

(b) A national bank organized and existing as a national banking association pursuant to the provisions of the National Bank Act, 12 U.S.C. §§ 21 et seq., and maintaining its principal office in this state;

(c) An Edge Act corporation organized pursuant to the provisions of § 25(a) of the Federal Reserve Act, 12 U.S.C. §§ 611 et seq., and maintaining an office in this state;

(d) An international bank agency licensed pursuant to the laws of this state;

(e) A federal agency licensed pursuant to §§ 4 and 5 of the International Banking Act of 1978 to maintain an office in this state;

(f) A savings association organized and existing under the laws of this state; or

(g) A federal association organized and existing pursuant to the provisions of the Home Owners' Loan Act of 1933, 12 U.S.C. §§ 1461 et seq., and maintaining its principal office in this state.

(10) "International banking facility" means a set of asset and liability accounts, segregated on the books and records of a banking organization, that includes only international banking facility deposits, borrowings, and extensions of credit as those terms are defined pursuant to § 655.071(2).

(11) "International banking transaction" means:

(a) The financing of the exportation from, or the importation into, the United States or between jurisdictions abroad of tangible personal property or services;

(b) The financing of the production, preparation, storage, or transportation of tangible personal property or services which are identifiable as being directly and solely for export from, or import into, the United States or between jurisdictions abroad;

(c) The financing of contracts, projects, or activities to be performed substantially abroad, except those transactions secured by a mortgage, deed of trust, or other lien upon real property located in the state;

(d) The receipt of deposits or borrowings or the extensions of credit by an international banking facility, except the loan or deposit of funds secured by mortgage, deed of trust, or other lien upon real property located in the state; or

(e) Entering into foreign exchange trading or hedging transactions in connection with the activities described in paragraph (d).

(12) "Abroad" means in one or more foreign nations, or in the colonies, dependencies, possessions or territories

thereof or of the United States or the Commonwealth of Puerto Rico.

199.032 Levy.—There is hereby levied, to be assessed and collected as provided by this chapter:

(1) An annual tax of 1 mill on the dollar of the just valuation of all intangible personal property, except money as defined in § 199.023(1)(a), and except notes, bonds, and other obligations for payment of money which are secured by mortgage, deed of trust, or other lien upon real property situated in the state;

(2) A nonrecurring tax of 2 mills on the dollar of the just valuation of all notes, bonds, and other obligations for payment of money which are secured by mortgage, deed of trust, or other lien upon real property situated in the state.

(3) When notes, bonds, and other obligations for the payment of money are secured by personalty, taxable as provided for in subsection (1), and are also secured by real property, taxable as provided for in subsection (2), the taxpayer may elect to be taxed under subsections (1) and (2) hereof, and the tax shall be apportioned, based upon the value of the genuine primary security.

199.042 Date of delinquency; discounts for early payment.—

(1)(a) All annual taxes on intangible personal property shall be due and payable so as to be received by the department by June 30 of each year and shall be delinquent on and after July 1 of each year. However, no return to the department shall be considered delinquent when said return is postmarked not later than the 30th day of such month. If June 30 falls on a Saturday, Sunday, or a federal or state holiday, no return postmarked or delivered to the department on the first workday immediately following such date shall be considered delinquent.

(b) The full amount of the taxes shown on any return required under this chapter shall accompany the return at the time of its filing. On all payments, discounts for early payment thereof shall be allowed as follows:

1. For payment in April or prior thereto, 4 percent;

2. For payment in May, 2 percent;

3. Tax payments made in June shall be without discount.

(2) All intangible taxes on notes, bonds, and other obligations for payment of money which are secured by mortgage, deed of trust, or other lien upon real property situated in the state shall be due and payable when the instrument is recorded or sought to be enforced.

199.052 Returns.—

(1) It is hereby made the duty of every person in the state, and every person who has become a legal resident of the state on or before January 1, who owns or has control, management, or custody of intangible personal property which is subject to annual taxation under this chapter to file a sworn return with the department on or before June 30 of each year, listing separately the character, description, location, and just valuation of all such property. This subsection applies to any person, regardless of domicile, who owns or has management, custody, or control of intangible property that has acquired a business situs in this state.

(2) No taxpayer subject to the annual tax imposed by this chapter shall be required to file a return or pay a tax thereunder if the aggregate annual tax upon the taxpayer's intangible personal property for any year is less than $5. However, a banking organization claiming the exemption provided in § 199.072(4) shall be required to file a return regardless of the tax liability of the organization. Agents and fiduciaries shall report for each person

for whom they hold intangibles if the aggregate annual tax on each person is more than $5.

(3) Husband and wife may file a joint return listing all intangible personal property held jointly or singly by them, and they shall be jointly liable for the payment of all taxes due under this chapter. Husband and wife filing jointly shall be entitled to two exemptions as provided in § 199.072(3).

(4) The beneficial interest of a resident of Florida in a foreign trust shall be returned by the resident unless the trustee returns the resident's beneficial interest for taxation. Any foreign trustee may return the full value of the principal of the trust for taxation, in which event the owners of all beneficial interests in the trust shall not be required to return such interests.

(5) An affiliated group of corporations shall have the privilege of making a consolidated return. The making of a consolidated return shall be upon the condition that all includable corporations which are members of the affiliated group consent to be included in said return. The making of a consolidated return shall be considered as such consent; however, the making of a consolidated return shall not operate to provide taxable situs for intangibles held by an includable corporation when the intangibles would not otherwise be required to be returned for taxation. The fact that members of an affiliated group own stock in corporations which do not qualify under the stock ownership requirements as members of an affiliated group will not preclude the filing of a consolidated return on behalf of the qualified members. In the case of consolidated returns, intercompany accounts, including the capital stock of an includable corporation other than the parent, owned by another includable corporation, shall not be subject to taxation under this chapter. However, capital stock and other intercompany accounts of a nonqualified member of the affiliated group shall be returned and taxed. Each corporation filing a

consolidated return shall submit therewith a separate balance sheet, which shall properly identify and separately state all intercompany accounts, for each company included therein.

(6) The tax imposed on intangible personal property reported and paid by a trustee under subsection (1) or subsection (4), as agent, shall not be returned by the person owning, or having a beneficial interest in, such property.

(7) (a) Every person who shall take, receive, or record any note, bond, or other obligation for the payment of money which is secured by mortgage, deed of trust, or other written specific lien in the nature of a mortage upon real property situated in the state shall pay the tax prescribed by this chapter in respect to the debt or obligation secured thereby to the clerk of the circuit court at the time the instrument is presented for recordation or, if not so presented, at the time of execution. In evidence thereof, the clerk of the circuit court, upon receiving payment thereof, shall place on such instrument a notation showing the amount of tax levied by this chapter and received by him.

(b) Any mortgage, deed of trust, or other lien given to replace a defective mortgage, deed of trust, or other lien, covering the identical real property as the original and securing identical original note or obligation, may be recorded without payment of additional tax upon proof of payment of the tax upon the original recording. The clerk shall place a notation on the new mortgage, deed of trust, or other lien showing that the tax has been paid on the original recording.

(c) No mortgage, deed of trust, or written evidence of a specific lien in the nature of a mortgage on real property shall be recorded in any public record of the state or be enforceable in any court of the state unless and until the tax levied by this chapter has been paid and until the

notation of the clerk of the circuit court has been placed thereon showing the payment of the tax. However, the failure to place the notation thereon or to pay the correct amount of tax shall not affect the constructive notice given by the recordation of the mortgage, deed of trust, or instrument evidencing a lien. However, the provisions of this chapter do not apply to the assumption of a mortgage agreement between the mortgagor and his grantee when the amount of the indebtedness remains the same, whether or not the original obligator is released from liability on the note and mortgage.

(d) If the mortgage, deed of trust, or other lien subject to the tax levied by this chapter secures future advances, as provided in § 697.02, the tax shall be paid at the time of execution on the initial debt or obligation secured, excluding future advances; at the time and so often as any future advance is made, the tax shall be paid on all sums then advanced. Any increase in the amount of original indebtedness caused by interest accruing under an adjustable rate note or mortgage having an initial interest rate adjustment interval of not less than 6 months shall, however, be taxable as a future advance only to the extent such increase is a computable sum certain when the document is executed. The trustee under any such deed of trust or the owner of any such mortgage or other instrument evidencing such lien making any such advance shall pay the tax prescribed in this chapter in respect to the amount of the advance; and the clerk shall place a notation on the record of the mortgage, deed of trust, or other instrument evidencing such lien, or upon any supplemental instrument evidencing such advance and offered for recording, showing the amount of tax received by him. Failure to pay the tax shall not affect the lien for any such future advance given by § 697.04, but any person who fails or refuses to pay such tax due by him is guilty of a misdemeanor and upon conviction shall be fined accordingly. The mortgage, deed of trust, or other instrument shall

not be enforceable in any court of this state as to any such advance unless and until the tax due thereon upon each advance that may have been made thereunder has been paid.

(e) The clerk of the circuit court shall, on or before the 20th day of each month, transmit to the department all intangible taxes collected by him during the preceding month, together with a list of all instruments upon which the tax was paid.

(8) Every banking organization otherwise required to file a return under this chapter shall certify to the department the character, description, location, and just valuation by category of all intangible personal property issued in or arising out of international banking transactions and owned by such banking organization.

(9) (a) Filing returns or paying all or any portion of tax as shown on the return after the due date shall require a delinquency penalty of 5 percent for each month, or portion thereof, on the amount of tax delinquent but not to exceed 25 percent of the total tax levied against the property covered by that return.

(b) If any amount of tax imposed by § 199.032(1) is not paid on or before the date prescribed for payment of such tax, determined without regard to any extensions, interest of 12 percent per year on the unpaid amount shall be paid from such date to the date of payment. Interest prescribed by this paragraph on any tax shall be deemed assessed upon the assessment of the tax to which such interest relates and shall be collected and paid in the same manner as taxes.

(c) Property omitted from any return shall require, in addition to the delinquency penalty, a specific penalty of 15 percent of the tax attributed to the omitted property.

(d) Property undervalued shall require a specific penalty of 15 percent of the tax attributed to the undervaluation.

(e) The department may settle or compromise such interest or penalties pursuant to § 213.21.

(10) Stock held in margin accounts in other than a fiduciary relationship shall be reported and the tax thereon paid by the customer purchasing the same, but under no circumstances shall the security broker from whom the stock is purchased be required to report or pay the tax on said margin accounts.

199.062 Information reports; companies, corporations, and brokers.—

(1) Every company or corporation, including financial institutions, qualified to do business in this state, domestic or foreign, shall file with the department, on or before June 30 of each year, a report of all its registered Florida stockholders as of December 31 of the previous year, except that no report is required under this subsection:

(a) If the security is not taxable under this chapter;

(b) If the company has paid any dividend during the previous year on the class of security held by the Florida stockholder;

(c) If the company has exercised the election to pay the tax as agent for its Florida stockholders under subsection (3); or

(d) If there are no Florida stockholders.

(2) The report shall be on forms prescribed or approved by the department and shall include the name, address, and social security or federal employer identification number of each Florida stockholder, the number and class of shares held by each Florida stockholder, the just value of each class on January 1 of the tax year, and such other information as may be reasonably required by the department.

(3) (a) Every company or corporation, including financial institutions, qualified to do business in this state, domestic or foreign, shall have the election each tax year to pay the intangible tax on any class of its stock, as agent for its Florida stockholders, and be relieved of the duty to file the report of registered Florida stockholders for any such class of stock for the tax year required under subsection (1).

(b) The election shall be affirmatively exercised by the company or corporation by filing written notification of the election with the department on or before June 30 each year on forms prescribed by the department by rule. In addition, a company or corporation exercising this election shall furnish its Florida stockholders with written notice, on or before April 1 of each year, that the company or corporation as agent has exercised the election to pay the tax on the class or classes of stock for the year. A company exercising this election shall certify on the notification filed with the department that its shareholders were notified by April 1 of the election by the company to pay as agent.

(c) If the company or corporation fails to notify the department of its election to pay the tax as agent, the election shall not be valid, regardless of any notification provided stockholders; and the company or corporation shall be required to file the report for all its Florida stockholders under subsection (1), regardless of any exception in subsection (1).

(d) Once a company or corporation has exercised the election under this section, the election for the tax year may not be amended or revoked and shall be binding on the company for the tax year. However, such election shall not be binding for other tax years.

(4) All security brokers registered under the laws of Florida shall file with the department, on or before June 30 of each year, a position statement as of December 31 of the preceding year for each customer whose mailing address is within the state. Such statement shall include

the customer's name, address, social security number or federal identification number, the number and description of all securities held for the customer, and such other information as the department may reasonably require.

(5) In order to provide for uniform reporting, every company or corporation qualified to do business in this state shall:

(a) On or before April 1 of each year notify its Florida stockholders of record as of December 31 of the preceding year of the just value on January 1 of each class of its stock which is not regularly listed on any of the public stock exchanges or which is not regularly traded over the counter. Such notification is required when a class of stock is regularly listed or regularly traded over the counter and the shares are subject to restrictions and the value reportable by the stockholder is less than the published price. Values determined by a company or corporation shall not be binding on the department. In the event the department determines the stock is undervalued, it shall proceed to assess and collect from each person subject to tax the amount of tax, penalty, and interest due on such shares based on the correct value.

(b) On or before June 30 of each year:

1. Furnish the department with written notification of any of its shares which are not taxable under this chapter.

2. Furnish the department with written notification of the fact that the company or corporation has paid a dividend during the previous calendar year to the holders of any class of its stock.

3. Furnish the department with written notification in the event that there are no Florida stockholders for all classes of its stock.

4. File with the department the valuation information required under paragraph (a), along with certification that its Florida shareholders were furnished the required information by April 1.

(6) (a) Failure to file the reports required by subsection (1) or subsection (4) within the time required shall subject the company, corporation, or broker to a penalty. The penalty shall be the lesser of $10 for each Florida stock holder record or Florida customer record, as the case may be, not timely filed, or $100 plus $50 for each month or portion thereof from the date due until satisfactory filing with the department.

(b) Failure to file the notifications required by paragraph (5) (b) shall subject the company or corporation to a penalty of $100.

(c) Such penalties shall be assessed and collected in the same manner as other penalties imposed by this chapter. The department may waive or compromise such penalties under the provisions of § 213.21.

(7) (a) The department is specifically authorized and empowered, after making written request, to examine at all reasonable hours all books, records, and other documents relating to the reports of companies, corporations, and brokers charged with the duty to file reports or make reports required in this section.

(b) In the event that a company, corporation, or broker refuses to permit examination of such records by the department, the department shall have the right to proceed in any circuit court against such company, corporation, or broker to seek a mandatory injunction or other appropriate remedy to enforce its right, as granted by this section, to require examination of such records. If the injunction or other appropriate remedy is granted, the court may order the company, corporation, or broker to pay the costs of such legal action and the cost of the subsequent examination by the department.

(8) The companies, corporations, and brokers subject to the provisions of this section shall keep and preserve all books, records, and documents relating to the information reported under this section for a period of 3 years from June 30 of each tax year.

199.072 Exemptions.—

(1) The following intangible property shall be exempt from the tax imposed by this chapter:

(a) Property owned by the state or any political subdivision or municipality thereof, except that any leasehold estate or possessory interest which is defined by § 199.023(1)(f) and upon which rental payments are due in consideration of such leasehold estate or possessory interest shall be subject to the tax imposed by this chapter;

(b) Franchises;

(c) Any interest in a partnership, either general or limited; it is declared to be the legislative intent that this paragraph is an interpretation of the prior law and that the provisions of this chapter are not intended to tax any interest of a partner in a partnership;

(d) Bonds of the several municipalities, counties, and other taxing districts of the state[1] and bonds of the United States Government and its agencies;

(e) Intangible personal property held in trust pursuant to any employee welfare or benefit plan which is qualified under § 401, United States Internal Revenue Code, 1954;

(f) Notes and other obligations, except bonds, to the extent that such notes and obligations are secured by mortgage, deed of trust, or other lien upon real property situated outside the state; and

(g) The assets of a corporation registered under the Investment Company Act of 1940, 15 U.S.C. § 80a-1-52, as amended.

(2)(a) There shall also be exempt from the tax imposed by this chapter intangible personal property owned by nonprofit religious, nonprofit educational, or nonprofit charitable institutions.

(b) The provisions of this subsection authorizing exemptions from tax for religious, educational, and charitable institutions shall be strictly defined, limited, and applied in each category as follows:

1. "Religious institutions" means churches and ecclesiastical or denominational organizations, or established physical places for worship in this state at which nonprofit religious services and activities are regularly conducted and carried on and also means church cemeteries.

2. "Educational institutions" means state tax-supported or parochial, church, and nonprofit private schools, colleges, or universities conducting regular classes and courses of study required for accreditation by, or memship in, the Southern Association of Colleges and Secondary Schools, Department of Education, or the Florida Council of Independent Schools. Nonprofit libraries, art galleries, and museums open to the public are defined as educational institutions and are eligible for exemption.

3. "Charitable institutions" means only nonprofit corporations operating physical facilities in Florida at which are provided charitable services, a reasonable percentage of which shall be without cost to those unable to pay, and those institutions qualified as charitable under § 501 (c)(3), United States Internal Revenue Code, 1954.

(c) Property owned by such exempt institutions shall not include intangible personal property held in trusts of any kind over which the institution has no interest in the trust principal except the right to compel the performance of the trust agreement.

(3) There shall be allowed to every taxpayer who is a natural person an exemption of the first $20,000 of prop-

erty subject to the taxes imposed by § 199.032(1). Agents and fiduciaries filing as such shall not be entitled to claim the exemption afforded hereby in their own right or on behalf of their principals or beneficiaries. When any property is held by an agent or fiduciary, a principal or beneficiary may file a return, and the exemption afforded hereby may be claimed by such principal or beneficiary on his return. No taxpayer shall be entitled to more than one exemption as provided by this section. The exemption provided in this subsection shall not be applicable to that intangible personal property described in § 199.023(1)(f).

(4) All intangible personal property issued in or arising out of any international banking transaction and owned by a banking organization shall be exempt from the tax imposed by § 199.032(1).

PART II

ASSESSMENT PROCEDURES

199.103 Basis of assessment.—The department shall assess all intangible personal property subject to the annual tax imposed by this chapter at its just valuation as of January 1 of each year.

199.112 Business situs.—

(1) All bills, notes or accounts receivable, obligations, or credits, wheresoever situated, arising out of, or issued in connection with, the sale, leasing, or servicing of real or personal property in the state are subject to taxation under this chapter, it being the legislative intent to provide that such intangibles shall be assessable regardless

of where they are kept, approved as to their creation, or paid. This provision shall apply to any person representing business interests in the state that may claim a domicile elsewhere, the intent further being that no nonresident, either by himself or through an agent, transact business in the state without paying the same tax which the state would impose on residents transacting the same business. Sales of tangible personal property are in this state if the property is delivered or shipped to a purchaser within this state, regardless of the f.o.b. point or other conditions of the sale. The provisions of this section shall in no way be construed to alter the tax status of intangibles not connected with the sale, leasing, or servicing of real or personal property in the state.

(2) All bills, notes or accounts receivable, obligations, or credits, wheresover situated, arising out of, or issued in connection with, the sale of services in this state by any person representing business interests in this state that may claim domicile elsewhere are subject to taxation under this chapter; and such intangibles shall be assessable regardless of where they are kept, approved as to their creation, or paid.

199.122 Valuation.—Intangible personal property shall be valued in the following manner:

(1) Shares of stock of corporations regularly listed on any stock exchange or regularly traded over the counter shall be valued at their closing prices on the last business day of the previous calendar year.

(2) Bonds regularly listed on any stock exchange or regularly traded over the counter shall be valued at their closing bid prices on the last business day of the previous calendar year.

(3) Shares of stocks, bonds, or similar instruments of corporations not listed on any stock exchange or not regularly traded over the counter shall be valued in ac-

cordance with generally accepted accounting principles which take into account those factors customarily considered in determining intrinsic value.

(4) The blockage rule or discount theory shall have no effect on valuation of shares of stocks as defined herein.

(5) Accounts receivable shall be valued at their face value less a reasonable allowance for uncollectible accounts.

(6) All notes and other obligations shall have a value equal to their unpaid balance as of January 1 of each year, unless the taxpayer can establish a lesser value upon proof satisfactory to the department.

(7) All notes, bonds, and other obligations for payment of money which are secured by mortgage, deed of trust, or other lien upon real property situated in the state shall be valued at the principal amount of indebtedness evidenced by such obligation. A note, bond, or other obligation for payment of money secured by mortgage, deed of trust, or other lien on real properties situated both in and out of this state shall be valued at that portion of the principal amount of the indebtedness evidenced by such obligation which the value of the Florida real property securing the obligation bears to the total value of all real property securing the obligation at the time the document evidencing the obligation is executed.

(8) All other forms of intangible personal property shall be valued in accordance with generally accepted accounting principles which take into account those factors customarily considered in determining intrinsic value.

PART III

ADMINISTRATIVE, COLLECTION, AND ENFORCEMENT PROCEDURES

199.202 Administration of law; rules and regulations.—

(1) The cost of preparing and distributing the reports, forms, and paraphernalia for the collection of the tax imposed by this chapter and expenses of the inspection and enforcement duties required herein shall be borne by the revenue produced by this chapter.

(2) The department shall administer and enforce the assessment and collection of the taxes, interest, and penalties imposed by this chapter. It is authorized to make and publish such rules and regulations not inconsistent with this chapter as it may deem necessary to administer and enforce the provisions of this chapter.

(3) Penalties as provided in this chapter, unless waived or compromised by the department, shall be assessed and

collected in the same manner as the tax levied by this chapter.

199.212 All state agencies to cooperate in administration of law.—The department is empowered to call on any state, county, or municipal agency, department, bureau, or board for any and all information which may, in its judgment, be of assistance in administering, or preparing for the administration of, this chapter, and such state, county, or municipal agency, department, bureau, or board is hereby authorized, directed, and required to furnish such information.

199.222 Destruction of returns by department.—It shall be the duty of the department to destroy all intangible personal property tax returns filed with the department 4 years after the tax with respect to the return has been paid.

199.232 Powers of department.—

(1) The department shall ascertain by diligent search and inquiry whether all persons as defined in this chapter have made proper returns and whether all intangible personal property subject to taxation has been assessed. If the department discovers that any intangible personal property has for any reason escaped taxation or has been undervalued, it shall assess the same separately for each year that the property may have escaped taxation or has been undervalued, and the tax and penalties shall be levied and collected by the department.

(2) Upon discovery of any person that the department has reason to believe should have filed a return but who failed or refused to do so, the department may require that person to file completed returns for all years under investigation, including the current year. The total tax and penalties accrued to the date of payment must accompany such returns. On receipt of such returns, the department, using available information, shall

ascertain if any intangible personal property has either been omitted or undervalued. Upon discovery that intangible personal property was either omitted or undervalued, the department shall assess such property at the rate and in the manner as provided in this chapter.

(3) If, upon examination of returns that have been filed, the department has reason to believe that any intangible personal property has been omitted or has been undervalued, it may require the person filing the return to produce the books, records, and documents deemed necessary by the department to discover omitted property or to determine the just values of all listed or omitted property.

(4) The department is authorized to audit or inspect the books, records, or documents of persons and correct by credit or refund any overpayment of tax, and, in the event of a deficiency, an assessment of such deficiency shall be made and collected. No assessment shall be made, except pursuant to an investigation, after the expiration of 3 years from the due date for filing a return or the date of filing, whichever is later.

(5) (a) In the event any person charged herein:

1. Fails or refuses to make his books, records, or documents available for inspection, so that no audit or examination can be made of the books and records of such person; or

2. Fails to make a return and pay the tax as provided by this chapter; or

3. Makes a grossly incorrect return; or

4. Makes a return that is false and fraudulent,

it shall be the duty of the department to make an assessment from an estimate based on the best information then available to it for the taxable period, together with penalties if such have accrued.

(b) The department shall proceed to collect such taxes and penalties, if such have accrued, on the basis of such assessment, which shall be considered prima facie correct. The burden to show the contrary shall rest upon the person so assessed.

(6) It shall be the duty of every person required to make a return and pay tax under this chapter to keep and preserve suitable records of intangible personal property and such other books and documents as may be necessary to determine the amount of the tax due hereunder and other information as may be required by the department. It shall be the further duty of every such person so charged to keep and preserve, for the same 3-year period in which a refund would be allowed or the same 3-year period as prescribed herein for the time an assessment may be made by the department, all such records as may be required by the department for the reasonable administration of this chapter; and all such records shall be open to examination at all reasonable hours by the department or any of its duly authorized agents.

(7) An investigation may be made against a person for any year in which that person's right to a refund is available. The date a taxpayer is contacted personally by an agent of the department, or the date of a certified letter from the department to the last known address of the taxpayer, shall be the date that will govern the period subject to assessment.

(8) After an investigation has been completed and a deficiency is found to be due, the taxpayer shall be notified in writing, either by delivery or by certified mail at his or its last known address, of the amount of tax and penalty due. Full payment for the total amount shall be made by the taxpayer to the place designated and within the time specified in such notice.

(9) The department shall have the power to issue subpoenas to compel the attendance of witnesses and the production of documents, papers, books, records, and other evidence before it in any matter over which it has jurisdiction under this chapter. Any duly authorized representative of the department shall have the power to administer oaths and affirmations to any person.

(10) If any person shall refuse to obey any such subpoena, to give testimony, or to produce evidence as required thereby, any judge of a circuit court having jurisdiction over that person may, upon application of the department showing such failure and refusal to comply, make and issue such orders as may be necessary to secure the compliance of such person.

199.252 Refunds.—

(1) Any person or his heirs, personal representatives, or assigns shall be entitled to a refund of any tax or penalty levied under this chapter, whether payment was made voluntarily or involuntarily, which should not have been paid. No refund shall be allowed unless proper application has been made and delivered to the department for approval within 3 years from the date the right to such refund shall have accrued.

(2) When a bona fide controversy exists between the department and a taxpayer as to the liability of the taxpayer for the payment of the tax claimed to be due, the taxpayer may pay the amount claimed by the department to be due, or such lesser amount as may be fixed by a court of competent jurisdiction, and, if it is finally adjudged by a court of competent jurisdiction that the taxpayer was not liable for the payment of taxes and penalties, or any part thereof, the Comptroller shall make such refund as the court may direct.

199.262 Tax liens and garnishment.—

(1) When any tax imposed by this chapter becomes delinquent, or is otherwise in jeopardy, it shall be the duty of the department to issue a warrant for the full

amount of tax due or estimated to be due, together with penalties and cost of collection. Such warrant shall be directed to all and singular the sheriffs of the state and shall be recorded with the clerk of the circuit court in the county where the delinquent taxpayer's property is located. Upon recording, the amount of such warrant shall become a lien upon the taxpayer's real or personal property in such county in the same manner as a judgment duly docketed and recorded, and the clerk of the circuit court shall issue execution thereon the same as on a judgment. The sheriff shall thereupon proceed in all respects and with like effect and in the same manner as prescribed by law in respect to executions issued against property upon judgment of the circuit court, and he shall be entitled to the same fees for his services in executing the warrant. Upon payment of such execution, warrant, or judgment, the department is authorized and directed to satisfy the lien of record within 30 days; and any interested person may thereafter compel the department to satisfy the lien of records.

(2) Whenever it becomes necessary in the judgment of the department, it may issue an alias tax execution or tax executions which, however, shall be so designated on the face of the tax execution. Any such alias tax execution shall have the same force and effect as the original.

(3) Tax executions shall have the same force and effect as a writ of garnishment when levied upon any person, firm, or corporation that shall have any goods, moneys, chattels, or effects of the delinquent taxpayer in its hands, possession, or control or that shall be indebted to such delinquent taxpayer. When any tax execution is so levied upon any debtor or person holding property of the taxpayer, such debtor or person shall pay the debt or deliver the property of the delinquent taxpayer to the department or an authorized agent of the department levying such writ, and the receipt of the department or an authorized agent of the department shall be complete

discharge to that extent of the debtor or person holding such property.

(4) Any employee of the department designated in writing by the executive director of the department is authorized to make and sign assessments, tax warrants, assignments of tax warrants, and satisfactions of tax warrants.

(5) Whenever any tax execution issued under the provisions of this chapter or any previous law providing for the administration of intangible personal property tax becomes void by virtue of the expiration of any statute of limitations or otherwise, the department or any tax collector or other officer having official custody of the pertinent records shall have authority to cancel the same of record and shall do so upon the request of any interested person. Such cancellation shall be recorded by the clerks of the courts.

199.272 Suits for violation of this chapter; jurisdiction and service.—

(1) All suits brought hereinafter by the department against any person defined in this chapter for any violation of this chapter and for the purpose of effecting collection of any tax due from any person, including garnishment proceedings, regardless of the amount, shall be brought thereon in the circuit courts of this state having jurisdiction of the subject matter.

(2) Every person having his principal place of business outside of this state but subject to the provisions of this chapter shall designate with the department an agent for service within the state for the purpose of enforcing this chapter. If such person has not designated an agent, the Department of State shall be deemed the agent for service, or any agent or employee of the person within the state shall be deemed agent for service.

199.282 Punishment for violation of this chapter.— Any person willfully failing or refusing to comply with this chapter or violating any of the provisions hereof shall be guilty of a misdemeanor of the second degree, punishable as provided in § 775.082 or § 775.083.

199.292 Disposition of intangible personal property taxes; appropriations for expenses of assessment and collection; county sharing.—

(1) All intangible personal property taxes levied, assessed, and collected under and pursuant to this chapter shall be promptly remitted by the clerk of the circuit court or, during the implementation period, by the tax collector to the Department of Revenue, to be placed in a special fund designated as the "Intangible Tax Trust Fund." The amount collected by the Department of Revenue shall also be deposited in the Intangible Tax Trust Fund. Revenues derived from the intangible personal property tax on property defined by § 199.023(1)(f) shall be returned to the local school board in the county from which the revenue was derived.

(2) There is hereby appropriated annually out of the Intangible Tax Trust Fund the amount necessary for the effective and efficient performance of the duties, services, functions, and enforcement by the department of the provisions of chapters 192, 193, 194, 195, 196, 197, and 198 and this chapter and for the fees of the county property appraisers and tax collectors allowed them by the law for the assessment and collection of intangible personal property taxes. It shall be the duty of the department to pay from the Intangible Tax Trust Fund these costs and fees.

(3) The department shall pay from the Intangible Tax Trust Fund the entire cost of all forms, books, and records of any type required by law to be furnished each county or county officer by the Department of Revenue; and a sum sufficient to pay therefor is hereby annually appropriated out of the Intangible Tax Trust Fund.

(4) An amount equal to 55 percent of the total net intangible taxes collected shall be transferred to the Revenue Sharing Trust Fund for Counties in the month following collection. The remaining balance of net collections from this tax shall be transferred to the General Revenue Fund of the state. For the purposes of this law, "net collections" means the total amount collected less a pro rata share of all costs as provided in subsections (2) and (3).

(5) The distribution of these amounts shall be made quarterly in the months of September, December, March, and June and shall include the net collections through the end of the month preceding the distributions thereof.